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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 444.

CITY OF ERLANGER, KENTUCKY,
Petitioner,

versus

RAYMOND J. BERKEMEYER,
THE WEIL, ROTH & IRVING COMPANY,
JOHN D. EXTERKAMP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY TO BRIEF OF RESPONDENTS.

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Of Counsel.

November 25, 1953.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

CITATIONS.

Cases: PAGE

Pulaski County v. Ben Hur Life Association, 286 Ky. 119, 149 S. W. 747 3

Moore v. Clines, 247 Ky. 605, 57 S. W. 2d 509 3

Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741 4

Owings v. Rider, 241 Ky. 756, 45 S. W. 2d 487 4

Haggard v. Mutual Oil & Refining Co., 204 Ky. 209, 263 S. W. 745 4

Fields' Admr. v. Perry County State Bank, 214 Ky. 24, 282 S. W. 555 5

State of Arkansas v. State of Texas (decided November 16, 1953), 22 L. W. 4020 5

Statutes:

Carroll's Kentucky Statutes (1936)

§3720-b-1-(2) 3

§3720-b-3-(2) 3

§2741-L-(1) to (20) 2

§2741-L-5 3

Kentucky Revised Statutes 356.016 (NIL §16) 4

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REPLY TO BRIEF OF RESPONDENTS.

The Petition for Writ of Certiorari advanced two reasons why the Writ should be granted:

(1) The case presents an important question of Federal procedure which should be decided by this Court; and

(2) There is involved an important question of the public policy of the Commonwealth of Kentucky established by specific statute and by judicial decisions of that state, and that question was decided by the United States Court of Appeals for the Sixth Circuit in dis-

> regard of that public policy, that statute, and the decisions of the Court of Appeals of that state.

Respondents' brief does not directly challenge the proposition that there is presented an important question of Federal procedure which should be decided by this Court. It does not directly challenge the proposition that the case involves the public policy of Kentucky.

Instead of challenging either of those propositions, respondents content themselves with what may be regarded as a short brief on the merits. That brief is confined to two contentions:

> (1) that the Negotiable Instrument Law of Kentucky is in effect a codification of the Law Merchant; and that to the extent that the principles of the Law Merchant are inconsistent with the provisions of the Negotiable Instrument Law, the latter controls even though the statute under which the bonds in question were issued clearly provides to the contrary; and
>
> (2) that the statements of fact contained in the petition are not true.

The Neogtiable Instrument Law of Kentucky in its original form was enacted in 1904. The bonds involved here were authorized by an act of the Legislature enacted in 1926, as amended in 1930. *Carroll's Kentucky Statutes* (1936 Edition), Section 2741-L(1) to (20), both inclusive.

The Negotiable Instrument Law, in its original form and as it existed at the time of the enactment of

the statute under which the bonds here involved were authorized, and at the time those bonds were wrongfully put in circulation, provided that for an instrument to be negotiable under its provisions, same

> "must contain an unconditional promise or order to pay a sum certain in money" (Section 3720-b-1 (2), *Carroll's Kentucky Statutes,* 1936 Edition).

Section 3720-b-3 (2), *Carroll's Kentucky Statutes* (1936 Edition), provides:

> "An order or promise to pay out of a particular fund is not unconditional."

In addition to the provisions of Section 3720-b-3 (2) the Court of Appeals of Kentucky has expressly held that an instrument payable solely out of a special fund, such as revenue bonds, is not a negotiable instrument within the meaning of the Kentucky Negotiable Instrument Law. *Pulaski County* v. *Ben Hur Life Association,* 286 Ky. 119, 149 S. W. 747; *Moore* v. *Clines,* 247 Ky. 605, 57 S. W. 2d 509.

Of course, when the Legislature came to enact the statute authorizing the issue of sewer bonds such as those involved in this case, it could have provided that they should be negotiable instruments and subject to all of the provisions of the Negotiable Instrument Act (see *Pulaski County* v. *Ben Hur Life Association, supra*); but it did not do so. Instead, it provided that such bonds shall have

> "in the hands of bona fide holders all of the qualities of negotiable instruments under the law merchant" (Section 2741-L-5, *Carroll's Kentucky Statutes,* 1936 Edition).

Therefore, it is perfectly obvious that the bonds cannot be regarded as negotiable instruments under the Negotiable Instrument Law, and that the Legislature did not intend that they should be so regarded.

Section 16 of the Negotiable Instrument Law, in its original form and as it existed at the time the bonds here involved were prepared and without the consent of the City of Erlanger put in circulation, provided that when an instrument negotiable under its terms

> "is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed" (*Kentucky Revised Statutes* §356.016).

That is the section of the Negotiable Instrument Law that the United States Court of Appeals for the Sixth Circuit applied to the bonds here involved so as to deny the defense of original non-delivery, even though those bonds were not negotiable under that law, and notwithstanding the fact that the Court of Appeals of Kentucky, prior to the preparation of the bonds here involved, and prior to the time they were placed in circulation without the consent of the City of Erlanger, had held that no provision of the Negotiable Instrument Law applies to an instrument not negotiable under its terms. *Wettlaufer* v. *Baxter,* 137 Ky. 362, 125 S. W. 741 (decided in 1910). The Wettlaufer case has been cited with approval and followed in the subsequent cases of *Owings* v. *Rider,* 241 Ky. 756, 45 S. W. 2d 487; *Haggard* v. *Mutual Oil & Refining Co.,*

204 Ky. 209, 263 S. W. 745; and *Fields' Adm'r* v. *Perry County State Bank,* 214 Ky. 24, 282 S. W. 555.

So, it is perfectly obvious that the argument advanced by respondents in discussing the merits, to the effect that the United States Court of Appeals for the Sixth Circuit properly applied Section 16 of the Negotiable Instrument Law so as to deny to petitioner the defense of non-delivery, is without merit. When the United States Court of Appeals for the Sixth Circuit applied Section 16 of the Negotiable Instrument Law so as to deny to the City of Erlanger the defense of original non-delivery, it disregarded not only the statute of Kentucky, but the decisions of the Court of Appeals of that state; and in refusing to apply the provision of the Law Merchant so as to accord to the City of Erlanger the defense of original non-delivery, it disregarded another statute of Kentucky and the public policy of the state as exemplified by that statute.

A reference to the specific pages of the record cited in the Petition for Writ of Certiorari in support of the statements therein made is deemed a sufficient answer to the unjustified and ungracious charge made in the brief of respondents that the petition does not correctly state the facts.

In *State of Arkansas* v. *State of Texas* (decided November 16, 1953), 22 L. W. 4020, this Court again expressed its reluctance to decide an important question of state law in advance of an authoritative decision by the applicable state court in this language:

"Were we to undertake to resolve the questions we might find ourselves in conflict with the courts that have the final say."

Respectfully submitted,

CHAS. I. DAWSON,
Attorney for Petitioner,
City of Erlanger.

RUCKER TODD,
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BULLITT, DAWSON & TARRANT,
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